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*By Secretary of the Environment at 10:02 am, Jun 24, 2020*

**STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE APPLICATION  
OF THE UNITED STATES DEPARTMENT  
OF ENERGY AND LOS ALAMOS NATIONAL  
SECURITY, LLC FOR A GROUND WATER  
DISCHARGE PERMIT (DP-1132) FOR THE  
RADIOACTIVE LIQUID WASTE  
TREATMENT FACILITY**

**GWB 19-24 (P)**

**ORDER OF THE SECRETARY  
REMANDING FOR CONSIDERATION OF FINANCIAL ASSURANCE**

The Secretary of the Environment Department (“Secretary”), having considered the Hearing Record (as defined in 20.1.4.7(A)(14) NMAC), all post-hearing submittals, the Hearing Officer’s Report and the comments on the Hearing Officer’s Report, and being otherwise fully advised, **FINDS:**

1. The urgent duties of the Secretary related to the Executive Order concerning COVID-19 issued by the Governor of the State on March 11, 2020, as revised through June 12, 2020, have delayed the Secretary’s review and consideration of the Hearing Officer’s Report and the Hearing Record in this case.

2. The Application in this proceeding is for a ground water discharge permit (“DP-1132”) under the State Water Quality Act (“WQA”), NMSA 1978, Section 74-6-1 et seq., applicable to certain wastewater discharges that may be made from the radioactive liquid waste treatment facility (“RLWTF”) located at Los Alamos National Laboratory (“LANL”) and may move directly or indirectly into ground water.

3. The technical testimony submitted on behalf of Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, New Mexico Acequia Association and Tewa Women United (collectively, “Citizens”) addresses the history of the RLWTF and includes the opinion of

Citizens' technical witness that the State Hazardous Waste Act ("HWA"), NMSA 1978, Section 74-4-1 et seq., should be applied to the RLWTF. In the opinion of the witness, regulation of the RLWTF under the HWA is more stringent than regulation under the WQA and is thus more protective of the environment. Tr. 11-14-19, pp. 167-173. The technical testimony of the Citizens witness does not address in specific detail how regulation of the RLWTF under the HWA would be more protective of the environment.

4. Numerous persons expressed views similar to those expressed by the Citizens' witness in oral comments made at the public hearing and in written comments submitted for the Hearing Record, including comments made by representatives of Native American communities located in the vicinity of LANL. Tr. 11-14-19, pp. 92-105, 227; AR. 14894-15188.

5. The interplay between the HWA and the WQA is not a relevant consideration in this matter as the construct of the wastewater treatment unit exemption is a construct of the implementing regulations of the Resource Conservation and Recovery Act ("RCRA") and the HWA with relevance to Clean Water Act discharge permits – not WQA groundwater discharge permits. However, the Citizens raise an equitable argument as to whether the RCRA and HWA wastewater treatment unit exemption is practicably enforceable by the Department in the State. The Department cannot issue permits nor assure compliance with either section 402 or 307(b) of the Clean Water Act. The WQA applies to the Application in this case for the purpose of protecting groundwater in the State.

6. The Hearing Record and the public record reveal a longstanding legacy of contamination of soil, surface water and groundwater caused by operations of the Applicants, as evidenced by, among other public documents, the Federal Facility Compliance Order between the Department and the United States Department of Energy dated May 20, 1997, the Compliance

Orders on Consent issued by the Department under the HWA and entered into among the Department, the Applicants and predecessor operators of LANL on March 1, 2005 and in June, 2016.

7. The WQA makes the Applicants responsible for protecting the health of the citizens of New Mexico and the environment in part by eliminating contamination of the State's groundwater in connection with their operations, and the issuance of ground water discharge permits is the primary mechanism authorized under State law for protecting the State's groundwater.

8. The regulations of the Water Quality Control Commission ("WQCC") issued pursuant to the WQA to protect ground water state at 20.6.2.3107(A)(11) NMAC that each ground water discharge permit shall provide, "as the secretary may require", for a closure plan which includes closure measures, maintenance and monitoring plans, post-closure maintenance and monitoring plans and financial assurance.

9. The contingency plans and closure plan contained in the proposed DP-1132 do not include requirements that the Applicants provide financial assurance in connection with corrective action required under contingency plans, in connection with closure of the RLWTF or in connection with post-closure care of the RLWTF.

10. The technical testimony submitted at the public hearing and the non-technical public testimony and comments submitted at and after the public hearing contain no evidence related to financial assurance.

11. The concerns raised by Citizens and other members of the public in this proceeding may potentially be addressed by requiring adequate financial assurance for corrective action, closure, and post-closure care in DP-1132.

**THEREFORE, THE SECRETARY CONCLUDES:**

1. Given the longstanding legacy of contamination of soil, surface water and groundwater caused by the Applicant's operations, the public interest is served by requiring financial assurance provisions to be included in DP-1132, if the permit is issued as a result of this proceeding.

2. This proceeding should be remanded to the Ground Water Quality Bureau ("GWQB") for the purpose of considering the types and levels of financial assurance that should be applied to DP-1132, if issued as a result of this proceeding, including corrective action, closure and post-closure care of the facilities at the RLWTF that are the subject of DP-1132.

3. The GWQB is directed to publish notice(s) of its financial assurance proposal related to DP-1132 in accordance with 20.6.2 NMAC and 20.1.4 NMAC ("Permit Rules") of the Water Quality Control Commission and the Department and provide for public participation and a hearing, if requested pursuant to the Permit Rules.

4. The Hearing Officer is authorized and directed to rule on any procedural or other matters related to financial assurance for DP1132 and conduct any additional hearings that may be required on remand to the GWQB.

5. Matters related to the appropriate regulatory treatment of the RLWTF under the HWA, including the practicality of enforcement of the applicable HWA permit conditions, are properly raised before the HWB and not in this proceeding.

**IT IS THEREFORE ORDERED** that this proceeding is remanded to the GWQB for further proceedings consistent with this order and the Hearing Officer is directed to file a revised Hearing Officer's Report after the conduct of the proceedings on remand.

DATED: June 24, 2020.

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JAMES C. KENNEY, Secretary  
New Mexico Department of Environment